

No. 12418

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA STATE BOARD OF EQUALI-
ZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Receiver in Bankruptcy
of the Estate of Exeter Refining Company,
Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

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PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States for the
Southern District of California, Central Di-
vision.

In Bankruptcy No. 45355-Y

In the Matter of
EXETER REFINING COMPANY, a California
Corporation,

Debtor.

PETITION UNDER CHAPTER XI, SECTION
322 OF THE BANKRUPTCY ACT, AS
AMENDED

To the honorable judges of the above entitled court:

The verified petition of Exeter Refining Com-
pany, a California corporation, respectfully repre-
sents to the court as follows:

I.

That your petitioner now is, and at all times
herein mentioned has been, operating as a Cali-
fornia corporation, having its principal place of
business in the County of Los Angeles, State of
California, at 5843 Paramount Boulevard, Long
Beach, California, being engaged in the business
of refining and otherwise processing crude oils into
more refined petroleum products, including asphalt
and resinous substances. That petitioner is not a
municipal railroad, insurance or banking corpora-
tion, or a building and loan association, and is a
corporation entitled to file a petition under the
provisions of Chapter XI of the Bankruptcy Act,
as amended.

II.

That your petitioner has had its principal place of business and office in the County of Los Angeles, State of California, within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

III.

That no bankruptcy proceeding has heretofore been filed by your petitioner and no involuntary petition in bankruptcy is now pending against it.

IV.

That your petitioner believes that it is solvent but it is unable to pay its debts as they mature and proposes the plan of arrangement with its unsecured creditors as hereinafter set forth.

V.

That your petitioner alleges, as required by Section 324 of Chapter XI of the Bankruptcy Act, as amended:

(a) That your petitioner has no executory contracts insofar as it is now advised, except as shown in schedules.

(b) That a statement of affairs and schedules of assets and liabilities of your petitioner will be filed herewith or within the time directed by the above entitled court.

(c) That the Clerk's filing fee will be paid upon the filing of this petition.

(d) That your petitioner's assets are located within the County of Los Angeles, State of California.

That generally your petitioner's assets consist of various and sundry kinds of machinery and equipment suitable for the refining and storage of petroleum products, including a refinery and equipment essential to production of asphaltic and resinous materials; inventory of petroleum products on hand in all semi-finished and finished stages; transportation facilities necessary for transportation of products dealt in; and interest in the improvements on and profits from a marine terminal situated in the Los Angeles harbor area; miscellaneous supplies and other personal property necessary for the operation and conduct of the afore-described type of business.

That the estimated value of the assets of your petitioner, including the good will of the business, is the approximate sum of \$860,000.00, and its liabilities are in the approximate sum of \$860,000.00. That the estimated budget of the monthly expenses required to properly operate and carry on the business and commitments of your petitioner will not exceed the sum of \$60,000.

VI.

That your petitioners financial position became involved by reason of the fact that your petitioner

has recently been hampered by an absence of operating capital, which condition has been aggravated by the protracted maritime strike and by sales commitments at a fixed price in a rising market. The absence of operating capital resulted in an inability to purchase sufficient volume of petroleum products to process through petitioner's facilities. Petitioner at the present time has a broad and active market for all products it can produce at a substantial margin of profit, and petitioner is further possessed of purchase orders for its products in such volume that if the same can be met by the availability of sufficient operating capital to buy crude oil petitioner can operate to the benefit of the unsecured creditors. Your petitioner believes that legal proceedings will immediately follow unless this proceeding is filed forthwith, which legal proceedings will seriously jeopardize and interfere with petitioners ability to pay its just obligations. That a substantial benefit will result to the creditors of petitioner by and under an orderly liquidation of assets no longer needed by petitioner, and by and through the continued operation of petitioners business in which it is now engaged.

Debtors Proposed Plan of Arrangement

That your petitioner proposes the following plan of arrangement:

Article 1. That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A: Expenses of operation under plan of arrangement as may be authorized and allowed and ordered by the court.

Class B: Expenses of administration that may be allowed and ordered paid by the court pursuant to the provisions of Section 64-a of the Bankruptcy Act, as amended.

Class C: All creditors entitled to priority as provided in Section 64-a, subdivisions 2, 4, and 5 of the Act of Congress relating to bankruptcy, as amended.

Class D: Obligations as they mature to secured creditors in accordance with the terms of their contracts and/or as ordered by the court.

Class E: To pay pro-rata at such times as this Honorable Court may direct, and at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article 2. That your petitioner now owns a three-quarter interest in the improvements and facilities situated on a marine terminal located in the Los Angeles Harbor area, together with a like interest in the proceeds to be derived from the operations thereof. That said asset is of the approximate value of \$150,000. That the Farmers and Merchants Bank of Los Angeles, California, a banking association, is possessed of an instrument executed by petitioner wherein petitioner repre-

sents that it will not transfer, hypothecate, or sell any interest in or to said asset so long as petitioner remains a debtor of said bank. That petitioner is informed and believes, that said instrument is a nullity and of no force or effect whatsoever and if the same was so decreed that petitioner could sell and/or hypothecate said asset as the circumstances then justified so as to secure further operating capital or further secure those unsecured creditors of your petitioner.

Article 3. That immediately upon the filing of this petition your petitioner will cause to be presented before this Honorable Court for determination the status of this asset, and if as a result thereof it be determined that the same may be hypothecated or sold that permission will be requested either to hypothecate or sell the same as the circumstances justify, for the purpose of carrying out this proposed plan of arrangement and for the further purpose of securing operating capital.

Article 4. That a receiver be appointed to take possession of all assets of petitioner and to handle and dispose of receipts and to conduct and operate such of the business of the above named debtor as may be necessary to operate under the supervision and direction of this Honorable Court, with authority to employ such agents, managers, and assistants, and the necessary labor as may be required to carry out debtors plan of arrangement.

Article 5. That said receiver appointed be authorized and empowered by the Honorable Court to issue receiver's certificate in the approximate amount of \$125,000.00 the proceeds from which, subject to the approval of this Honorable Court, be used to satisfy existing tax and labor claims, the balance thereof being made available for operating capital, which then available operating capital coupled with the present inventory of approximately \$104,000.00 in value would provide ample funds for the operation of debtor's business at a substantial profit.

Article 6. That said receiver appointed be authorized and empowered to currently discount accounts receivable of the debtor as the same become available so as to insure sufficient operating capital for the purchase of substantial volumes of unrefined petroleum products necessary for the conduct of debtor's business.

Article 7. That the receiver be permitted and authorized to open a bank account in the Bank of America National Trust and Savings Association, main Los Angeles offices, where all moneys received by said receiver, either from the sale or hypothecation of assets, collection of accounts receivable, discounting of accounts receivable, or from the operation of any business which this court may authorize the receiver to operate, shall be forthwith deposited and shall not be withdrawn from said bank except upon the counter signature of a Referee in Bankruptcy.

That the receiver will sign all checks and will furnish the Referee in Bankruptcy, if required so to do, with duplicate deposit slips of the moneys so deposited in order that the court may be fully advised at all times as to the condition of the receiver's bank account.

Article 8. That no property of the debtor be sold, and no accounts receivable be settled, for less than their face value without the approval of this Honorable Court and in the manner provided by the Bankruptcy Act, as amended.

Article 9. That the court immediately appoint an appraiser as contemplated by Section 333 of Chapter XI of the Bankruptcy Act, as amended, for the purpose of immediately preparing and filing an inventory and appraisal of the property of the debtor.

Article 10. That the court shall retain jurisdiction of the debtor's property and the operation of same until payment in full of all unsecured creditors' claims.

Article 11. That in the event any claim is in controversy in respect to classification or amount due, the debtor under order of court may make such deposit in such manner as the court may direct in respect to said disputed claim and proceed to pay other creditors and be restored to possession pending a final determination of said disputed claim.

Article 12. That immediately upon filing of this petition your petitioner will request of the Exeter

Oil Company, Ltd., a Delaware corporation, the largest unsecured creditor of this debtor, that it waive its right to participate as an unsecured creditor of petitioner until fifty per cent of those claims of other unsecured creditors have been paid.

Article 13. That the debtor is advised that Chapter XI of the Bankruptcy Act, as amended, is the appropriate section of the Act under which to seek relief, and that your petitioner verily believes that its business can be operated in the manner herein designated, and if permitted to operate as proposed in this petition your petitioner can pay all its just debts in full within a period not exceeding two years and have its business remaining.

Article 14. That it is necessary for a speedy and proper administration of debtor's affairs and the equitable payment of creditors that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceedings in any form or manner other than before the above entitled court, or without the permission of the above entitled court first had and obtained, or from prosecuting further any suit now pending without the permission of this Honorable Court.

Wherefore, petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act, as amended, that all creditors and other parties be enjoined from commencing or further prosecuting any suit in any form or conducting any sale or foreclosure proceedings affecting the property of

petitioner, or repossessing any property without order of this Honorable Court first had and obtained; that this Honorable Court place a receiver in possession of all petitioner's assets with full authority to operate and carry on debtor's business and affairs pending confirmation of debtor's proposed plan of arrangement, and that adjudication be stayed; that this Honorable Court permit the receiver herein to sell, hypothecate, or otherwise dispose of any property not necessary for the conduct of debtor's business or needed for the purposes in said plan of arrangement contemplated; that this Honorable Court authorize such receiver as may be appointed to open the necessary bank account or accounts for the purpose of properly conducting its business, and that funds may be withdrawn as in said plan provided, and to take such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interested parties; and that your petitioner be granted such other and further relief as is just and proper in the premises.

EXETER REFINING
COMPANY,
a Corporation.

By /s/ HAROLD E. THOMAS,
Secretary.
Petitioner.

By /s/ JOHN D. MAHARG,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Harold E. Thomas, Secretary of Exeter Refining Company, a corporation, the petitioning debtor mentioned and described in the foregoing petition, hereby makes solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ HAROLD E. THOMAS.

Subscribed and sworn to before me this 16th day of October, 1947.

[Seal] /s/ GLADYS E. PADGETT,
Notary Public in and for said County and State.

[Endorsed]: Filed October 16, 1947.

— — —

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on October 16, 1947, before the said Court the petition of Exeter Refining Company, a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be re-

ferred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Exeter Refining Company, a corporation, shall attend before said referee on October 23, 1947, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Jacob Weinberger, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on October 16, 1947.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

[Endorsed]: Filed October 16, 1947.

[Title of District Court and Cause.]

OBJECTION TO CLAIM FILED BY STATE
BOARD OF EQUALIZATION IN THE
SUM OF \$3,926.36 AND NOTICE OF HEAR-
ING

Comes now, George T. Goggin, Receiver for the above-entitled debtor estate, and objects to the allowance of the claim of the State Board of Equalization filed in the above-entitled proceedings in the

sum of \$3,926.36, upon the ground that the said claimant has assessed a penalty of \$341.38 upon said claim of \$3,503.00 and has likewise made a charge that in the event the said tax is not paid by March 7, 1948, an additional penalty of \$350.30 will be added, and that said penalties are not allowable by virtue of the provisions of the Bankruptcy Act and the decisions with respect thereto.

Wherefore, your Receiver prays that the said claim of the State Board of Equalization be disallowed and that the same be reduced to a sum of \$3,503.00 plus interest to date of payment.

/s/ G. T. GOGGIN,

Receiver in Bankruptcy.

Notice is hereby given that a hearing on the objection to the foregoing claim will be had in the courtroom of the Honorable Benno M. Brink, Referee in Bankruptcy at 323 Federal Building, Temple and Spring Street, Los Angeles, California, on the 12th day of March, 1948, at the hour of 10 a.m. thereof.

Dated: This 5th day of March, 1948.

/s/ G. T. GOGGIN,

Receiver in Bankruptcy.

Affidavit of service by mail attached.

[Endorsed]: Filed March 6, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER RE CLAIM OF STATE
BOARD OF EQUALIZATION

Whereas, the Receiver's objections to the claim filed by the State Board of Equalization in the above entitled proceedings in the amount of \$3,926.36, plus interest in the sum of \$17.52 per month or fraction thereof after February 29, 1948, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, came on regularly for hearing on the 19th day of March, 1948, before the undersigned Referee; Ernest R. Utley appearing for and on behalf of said Receiver, and Fred N. Howser, Attorney General of the State of California, and Edward Sumner, Deputy Attorney General, appearing for and on behalf of the State Board of Equalization, the facts having been stipulated to in open court and the matter having been duly submitted for argument, the court being advised in the premises now makes the following:

Findings of Fact

I.

That the proceedings herein were filed on October 16, 1947, under and pursuant to Chapter XI of the Bankruptcy Act, as amended, and George T. Goggin was appointed and qualified as Receiver of the above entitled debtor's estate on October 17, 1947.

II.

That the claim of the State Board of Equalization for California Sales and Use taxes was duly filed within the time provided by law and that said claim was in the amount of \$3,926.36, plus interest in the sum of \$17.52 for each month, or fraction thereof, after February 29, 1948, to date of payment, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, and that no portion of said amounts were paid to said Board of Equalization by March 7, 1948.

III.

That the aforesaid sum of \$3,926.36 includes penalties in the total amount of \$341.38; that said penalties were imposed pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file Sales and Use Tax returns; that a portion of said penalties, namely, \$47.54, is attributable to the debtor's failure to file returns which were due prior to October 17, 1947, and that the remainder of said penalties, namely, \$293.84, is attributable to the failure to file sales tax returns for the period July 1, 1947, to October 16, 1947, said returns being due subsequent to October 17, 1947, the date of the appointment of the Receiver herein.

IV.

That the penalty in the sum of \$350.30 is imposed pursuant to Section 6565 of the Sales and Use Tax Law and is attributable to the Receiver's failure to

pay the sum of \$3,926.36, plus interest, by March 7, 1948, pursuant to the Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948.

V.

That the Receiver herein duly filed objections to the allowance of the aforesaid penalties in the amounts of \$341.38 and \$350.30 on the ground that said penalties are not provable or allowable by virtue of the provisions of the Bankruptcy Act.

VI.

That as of the 7th day of March, 1948, a proposed plan of arrangement filed herein had not as yet been approved or passed upon by this Court.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes as a matter of law:

I.

That the claim for the penalty in the sum of \$47.54 is an allowable claim under and pursuant to Section 307 of Chapter XI of the Bankruptcy Act, as amended, and should be paid by the debtor herein under the extension provisions of its plan of arrangement.

II.

That the claim for the penalty in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter XI, of the Bank-

ruptcy Act, as amended, and may not be paid by the debtor herein under the extension provisions of its plan of arrangement.

III.

That the aforesaid penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter XI of the Bankruptcy Act, as amended, as of October 16, 1947, the date of filing of the proceedings herein.

IV.

That the claim for said penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

V.

That the claim for penalties in the amount of \$350.30 attributable to the Receiver's failure to pay by March 7, 1948, the amounts determined to be due to the California State Board of Equalization under the California Sales and Use Tax Law, pursuant to the Notice of Determination dated February 6, 1948, is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said Receiver.

ORDER

It is therefore ordered, adjudged and decreed that the objections of the Receiver herein to the

claim of the California State Board of Equalization for penalties in the sum of \$47.54 be and the same are hereby overruled and the said claim for penalties in the sum of \$47.54 be and the same is hereby allowed and ordered paid on an extended basis pursuant to debtor's proposed plan of arrangement, and

It is further ordered, adjudged and decreed that the objections of the Receiver to the claim of the State Board of Equalization for penalties in the sums of \$293.48 and \$350.30, respectively, be and the same are hereby sustained and said claim for said penalties be and the same is hereby disallowed.

Dated: This 2nd day of December, 1948.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Approved as to Form:

.....
Attorney for Receiver.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.
Attorneys for Claimant.

[Endorsed]: Filed December 2, 1948.

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE PETITION
FOR REVIEW OF REFEREE'S ORDER

Your petitioner, the California State Board of Equalization, respectfully represents:

I.

That it has heretofore filed a claim in the above entitled proceedings for California Sales and Use Taxes, including penalties and interest, in the amount of \$3,926.36 plus additional penalties and interest from February 29, 1948.

II.

That the order of the Honorable Benno M. Brink, Referee in Bankruptcy, denying and disallowing a portion of said claim was signed and filed in the above court on the 2nd day of December, 1948.

III.

That the time within which said State Board of Equalization may petition for review of said Order will expire on the 12th day of December, 1948, pursuant to Section 39 (C) of the Federal Bankruptcy Act.

IV.

That due to counsel's absence from Los Angeles on official business, counsel was not informed of the signing and filing of the aforesaid Order until December 7, 1948.

V.

That due to the urgent press of other unforeseen business in the Attorney General's office, which will require counsel's exclusive attention from the date hereof to and including the first week in January, 1949, petitioner will not be able to file its petition for review of the aforesaid Order prior to the second week in January, 1949.

Wherefore, your petitioner respectfully petitions this Court for an Order extending to and including January 11, 1949, the time within which the petitioner may file its petition for review of the aforesaid Order dated December 2, 1948.

Dated: December 10, 1948.

CALIFORNIA STATE BOARD
OF EQUALIZATION,
Petitioner.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General,
Attorneys for Petitioner.

[Endorsed]: Filed December 10, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING PETITION FOR REVIEW OF REFEREE'S ORDER

Upon reading of the Petition for Extension of Time filed herein, and good cause existing therefor,

It Is Hereby Ordered that the California State Board of Equalization may have to and including January 11, 1949 within which to file its Petition for Review of the Order herein denying a part of the claim of said State Board of Equalization for taxes, penalties and interest due under the California Sales and Use Tax Law.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Dated: December 10, 1948.

[Endorsed]: Filed December 10, 1948.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Benno M. Brink, Referee in Bankruptcy:

The Petition of the California State Board of Equalization respectfully shows:

I.

Your petitioner, the California State Board of Equalization, is the duly created agency of the State of California administering the California Sales and Use Tax Law and has filed in the above entitled proceedings a Proof of Priority Claim for taxes as a charge against the within bankrupt estate under and pursuant to Section 64(a) of the Bankruptcy Act.

II.

That the receiver herein duly filed objections to the claim of petitioner on the ground that said claim includes penalties in the amounts of \$341.38 and \$350.30 and that said receiver prayed for an Order that said penalties be disallowed; that subsequent thereto, and on the 19th day of March, 1948, said objections to the claim of petitioner came on for hearing and that an Order was duly entered and filed in the above entitled court on the 2nd day of December, 1948 granting and sustaining the receiver's objections as to a portion of the aforesaid penalties and allowing the claim of petitioner with respect to the remaining portions of the penalties in words and figures as follows:

“Whereas, the Receiver's objections to the claim filed by the State Board of Equalization in the above entitled proceedings in the amount of \$3,926.36, plus interest in the sum of \$17.52 per month or fraction thereof after February 29, 1948, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, came on regularly for

hearing on the 19th day of March, 1948 before the undersigned Referee; Ernest R. Utley appearing for and on behalf of said Receiver, and Fred N. Howser, Attorney General of the State of California, and Edward Sumner, Deputy Attorney General, appearing for and on behalf of the State Board of Equalization, the facts having been stipulated to in open court and the matter having been duly submitted for argument, the court being advised in the premises now makes the following:

“Findings Of Fact

I.

“That the proceedings herein were filed on October 16, 1947 under and pursuant to Chapter XI of the Bankruptcy Act, as amended, and George T. Goggin was appointed and qualified as Receiver of the above entitled debtor's estate on October 17, 1947.

II.

“That the claim of the State Board of Equalization for California Sales and Use taxes was duly filed within the time provided by law and that said claim was in the amount of \$3,926.36, plus interest in the sum of \$17.52 for each month, or fraction thereof, after February 29, 1948, to date of payment, plus additional penalties in the sum of \$350.30 unless payment be made by March 7, 1948, and that no portion of said amounts were paid to said Board of Equalization by March 7, 1948.

III.

“That the aforesaid sum of \$3,926.36 includes penalties in the total amount of \$341.38; that said penalties were imposed pursuant to the provisions of Section 6511 of the Revenue and Taxation Code (Sales and Use Tax Law) of the State of California for failure to file Sales and Use Tax returns; that a portion of said penalties, namely \$47.54, is attributable to the debtor’s failure to file returns which were due prior to October 17, 1947 and that the remainder of said penalties, namely, \$293.84, is attributable to the failure to file sales tax returns for the period July 1, 1947 to October 16, 1947, said returns being due subsequent to October 17, 1947, the date of the appointment of the Receiver herein.

IV.

“That the penalty in the sum of \$350.30 is imposed pursuant to Section 6565 of the Sales and Use Tax Law and is attributable to the Receiver’s failure to pay the sum of \$3,926.36, plus interest, by March 7, 1948 pursuant to the Notice of Determination under the California Sales and Use Tax Law dated February 6, 1948.

V.

“That the Receiver herein duly filed objections to the allowance of the aforesaid penalties in the amounts of \$341.38 and \$350.30 on the ground that said penalties are not provable or allowable by virtue of the provisions of the Bankruptcy Act.

VI.

“That as of the 7th day of March, 1948 a proposed plan of arrangement filed herein had not as yet been approved or passed upon by this Court.

“Conclusions of Law

“From the foregoing Findings of Fact the Court concludes as a matter of law:

I.

“That the claim for the penalty in the sum of \$47.54 is an allowable claim under and pursuant to Section 307 of Chapter XI of the Bankruptcy Act, as amended, and should be paid by the debtor herein under the extension provisions of its plan of arrangement.

II.

“That the claim for the penalty in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter XI, of the Bankruptcy Act, as amended, and may not be paid by the debtor herein under the extension provisions of its plan of arrangement.

III.

“That the aforesaid penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter XI of the Bankruptcy Act, as amended, as of October 16, 1947, the date of filing of the proceedings herein.

IV.

“That the claim for said penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

V.

“That the claim for penalties in the amount of \$350.30 attributable to the Receiver’s failure to pay by March 7, 1948 the amounts determined to be due to the California State Board of Equalization under the California Sales and Use Tax Law, pursuant to the Notice of Determination dated February 6, 1948, is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said Receiver.

“Order

“It Is Therefore Ordered, Adjudged and Decreed that the objections of the Receiver herein to the claim of the California State Board of Equalization for penalties in the sum of \$47.54 be and the same are hereby overruled and the said claim for penalties in the sum of \$47.54 be and the same is hereby allowed and ordered paid on an extended basis pursuant to debtor’s proposed plan of arrangement, and

“It Is Further Ordered, Adjudged and Decreed that the objections of the Receiver to the claim of the State Board of Equalization for penalties in the sum of \$293.48 and \$350.30, respectively, be and the

same are hereby sustained and said claim for said penalties be and the same is hereby disallowed.”

That the Order of the Referee is erroneous for the following reasons:

A.

The Order is based on Conclusions of Law II and III which hold that the claim for penalties in the sum of \$293.48 is not an allowable claim under and pursuant to Section 307, Chapter 11 of the Bankruptcy Act, as amended, and specifically that said penalty in the sum of \$293.48 was not a contingent claim of the California State Board of Equalization within the purview of Section 307 of Chapter 11 as of October 16, 1947, the date of filing of the proceedings herein. The Order is further based on Conclusion of Law IV to the effect that the penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

This portion of the claim (namely, penalties in the sum of \$293.48) represents the penalty imposed by the California Sales and Use Tax Law as a result of the failure to file Sales and Use Tax returns for the period of taxpayer's operations July 1, 1947 to October 16, 1947, said returns being due under said Sales and Use Tax Law subsequent to October 17, 1947, the date of the appointment of the receiver herein. The amount of tax for said period, as well as the penalties which would be imposed if the return for said period were not filed within the time

provided for could have been computed on October 16, 1947 inasmuch as said tax and penalties are fixed percentages of the gross taxable receipts received by the taxpayer during the period in question. It is the position of the State Board of Equalization that the penalty represents a contingent debt of the debtor within the purview of Section 307 of the Bankruptcy Act.

It is the further contention of the California State Board of Equalization that said penalty should have been allowed as an expense of administration by virtue of the fact that the return was required to be filed subsequent to the appointment of the receiver herein and that the receiver was under a duty (28 U.S.C.A. 124a) to file all state tax returns and make payment of taxes due under state law during the period of his office.

B.

The Order is further erroneous in that it is based on Conclusion of Law V to the effect that the claim for penalties in the amount of \$350.30 attributable to the receiver's failure to pay by March 7, 1948 the amounts determined to be due the California State Board of Equalization under the California Sales and Use Tax Law pursuant to a Notice of Determination dated February 6, 1948 is not an allowable claim inasmuch as said penalties were imposed with respect to a taxable period prior to the appointment and qualification of said receiver. It is the position of the California State Board of

Equalization that it was the duty of the receiver (28 U.S.C.A. 124a) to pay all state taxes determined to be due under state law prior to the delinquency date and that inasmuch as the very accrual of the penalty is attributable to the receiver's failure to make timely payment establishes that the claim should, accordingly, have been allowed as an expense of administration.

It is to be noted further that the amount of this penalty could also have been computed on October 16, 1947 and that this penalty may also be classified as a contingent debt within the meaning of Section 307 of the Bankruptcy Act.

Wherefore your petitioner, feeling aggrieved because of such Order, prays that the same be vacated and set aside and that this court order that the petitioner's claim be allowed in its entirety.

Dated: January 11, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Atty. Gen.

Attorneys for California State Board of Equalization.

State of California,
County of Los Angeles—ss.

Edward Sumner being by me first duly sworn, deposes and says: That he is attorney for petitioner in the above entitled matter; that he has heard read

the foregoing petition for review and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, that he believes it to be true.

/s/ EDWARD SUMNER.

Subscribed and sworn to before me this 11th day of January, 1949.

/s/ VINCENT P. LAFFERTY.

FRED N. HOWSER,
Attorney General.

[Seal] By /s/ VINCENT P. LAFFERTY,
Deputy.

Affidavit of service by mail attached.

[Endorsed]: Filed January 11, 1949.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER RE CLAIM OF
STATE BOARD OF EQUALIZATION

To the Honorable Leon R. Yankwich, Judge of the
Above Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference, do hereby certify to the following:

The California State Board of Equalization has duly filed its petition for the review of an order made in this matter by your Referee on December 2, 1948, in which he disallowed two items of penalty, in the respective sums of \$293.84 and \$350.30, which had been claimed by the said Board of Equalization.

The Proceedings

This is a proceeding under Chapter XI of the Bankruptcy Act which began on October 16, 1947. On October 17, 1947, George T. Goggin was appointed and qualified as receiver in the case and as such receiver, he had authority to and he did operate the business of the debtor.

The debtor's plan of arrangement in the matter was, in due time, confirmed. Essentially, the said plan of arrangement was a composition in that it proposed that the debtor would pay 50% of its unsecured debts in full settlement thereof. However, the plan provided that if any creditor so

elected in writing, prior to the confirmation of the plan, the debtor would pay the debt owing to such creditor in full in certain installments. Therefore, there were, in effect, two plans in one, a composition and an extension.

In the course of the proceeding the California State Board of Equalization filed its claim for \$3,926.36 which included sales taxes, interest and two penalty items of \$47.54 and \$293.48. The said claim also demanded the payment of further interest to the date of payment of the claim and a further penalty of \$350.30 if payment was not made by March 7, 1948.

No objection was made to the aforesaid sales taxes or interest, but the receiver did file objections to each and all of the aforesaid items of penalty. Payment of the said sales taxes and interest was made by the receiver subsequent to the aforesaid date of March 7, 1948.

The aforesaid penalty of \$47.54 was assessed for the failure of the debtor to file certain sales tax returns which were due prior to the date of the commencement of this proceeding.

The aforesaid penalty of \$293.84 was assessed for the failure to file sales tax returns for the period from July 1, 1947, to October 16, 1947, the date of the commencement of this proceeding, the said returns being due subsequent to October 17, 1947, the date of the appointment and qualification of the receiver herein.

The aforesaid penalty of \$350.30 was claimed for the failure of the receiver to pay the aforesaid sales taxes and interest by March 7, 1948.

The State Board of Equalization contends that all of the aforesaid penalties were prior tax obligations of the debtor or that, at least, they were contingent general unsecured debts of the debtor at the time this proceeding began on October 16, 1947. The said Board, in its petition for review, further contends that the said penalties of \$293.84 and \$350.30 were allowable as expenses of administration, since they accrued, so it is said, because of the failure of the receiver to file the returns and to make the payments which should have been filed and paid subsequent to his appointment and qualification.

After hearing the matter your Referee allowed the aforesaid penalty of \$47.54 as a general unsecured debt to be paid by the debtor under the extension provisions of its confirmed plan of arrangement and pursuant to the provisions of Section 307 of Chapter XI of the Bankruptcy Act. However, your Referee disallowed completely the remaining penalties of \$293.48 and \$350.30. It is from your Referee's order of disallowance of said penalties of \$293.48 and \$350.30 that this review is taken.

The Questions Presented

The questions presented by this review are set forth in detail on pages six and seven of the petition for review which is going up with this certificate.

The Evidence

There is no formal evidence to transmit, the facts in the matter being as they are hereinbefore set forth.

Referee's Findings of Fact, Conclusions of Law and Order

The original of your Referee's findings of fact, conclusions of law and order in this matter is going up with this certificate.

Papers Submitted

For the information of the Court the following papers are herewith transmitted:

1. Objection to Claim filed by State Board of Equalization in the sum of \$3,926.36 and Notice of Hearing, filed March 6, 1948.

2. Memorandum in Opposition to Objection to Claim filed by State Board of Equalization in the sum of \$3,926.36, plus additional interest, filed March 31, 1948.

3. Memorandum in re Receiver's Objections to Claim of State Board of Equalization, filed April 14, 1948.

4. Supplement to Memorandum in re Receiver's Objections to Claim of State Board of Equalization, filed April 26, 1948.

5. Findings of Fact, Conclusions of Law and Order re Claim of State Board of Equalization,

filed December 2, 1948.

6. Petition for Extension of time within which to file Petition for Review of Referee's Order, filed December 10, 1948.

7. Order Extending Time for filing Petition for Review of Referee's Order, filed December 10, 1948.

8. Petition for Review, filed January 11, 1949.

Respectfully submitted this 8th day of February, 1949.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed February 8, 1949.

United States District Court, Southern District of
California, Central Division

No. 45,355-Y

In the Matter of
EXETER REFINING COMPANY,
Bankrupt.

DECISION

The petitions of the California Department of Employment and the Board of Equalization to review the orders of the Referee, dated December 2, 1948, heretofore argued and submitted, are now decided as follows:

The said orders of the Referee, dated December 2, 1948, are, and each of them is, affirmed.

A study of the record leads me to the conclusion that the Referee's conclusions as to these matters, as stated in the Memorandum Opinion, dated April 14, 1948, are correct. Indeed, on April 21, 1949, I reached similar conclusions as to claims for penalties claimed by State tax agencies in the case of Alta Vineyards Co., No. 6371, Northern Division. The trend against saddling the bankrupt estate with penalties of any kind, under the mandate of Section 57(j) of the Bankruptcy Act is evidenced by the recent decision of the Supreme Court in *New York v. Soper*, 336 U. S. 328, disallowing interest on tax claims after date of bankruptcy.

A transcript of the oral opinion in the Alta Vineyards matter will be filed in this proceeding with this order.

Hence the ruling above made.

Formal orders to follow.

Dated this 22nd day of June, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

ORDER OF JUDGE ON PETITION FOR
REVIEW OF REFEREE'S ORDER

At Los Angeles in said district on the 20th day of October, 1949:

Upon the Petition for Review of the California State Board of Equalization filed the 11th day of January, 1949, upon the Certificate of the Referee dated the 8th day of February, 1949, and filed, and upon all proceedings had before the Referee as appears from his said Certificate, and upon hearing counsel for the parties, it is

Ordered that the Order of the Referee entered herein the 2nd day of December, 1948, disallowing tax penalties claimed by said California State Board of Equalization in the sums of \$293.48 and \$350.30 be and the same hereby is affirmed.

/s/ LEON R. YANKWICH,
Judge, U. S. District Court.

Approved as to form:

/s/ ERNEST R. UTLEY,
Attorney for Receiver.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Judgment entered Oct. 21, 1949.

Docketed Nov. 15, 1949.

[Endorsed]: Filed October 21, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the California State Board of Equalization, claimant in the above entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable Judge Leon Yankwich, entered on the 21st day of October, 1949, on petition for review of Referee's order disallowing tax penalties claimed by, said California State Board of Equalization in the total sum of \$643.78.

Dated: This 15th day of November, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for California State Board of Equalization.

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to trans-

act business in the State of California, is held and firmly bound unto George T. Goggin, Receiver in Bankruptcy for Exeter Refining Company, a corporation, Debtor in the above-entitled matter, in the penal sum of Two Hundred Fifty and no/100 Dollars (\$250.00), to be paid to said George T. Goggin, Receiver in Bankruptcy for Exeter Refining Company, a corporation, his successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, the State Board of Equalization of the State of California is about to take an appeal to the 9th Circuit Court of Appeals from an Order made and entered on October 21st, 1949, by the United States District Court for the Southern District of California, Central Division, in the above-entitled action, affirming the Order of the Referee entered December 2nd, 1948, disallowing tax penalties by the California State Board of Equalization.

Now, Therefore, if the above-named Appellant, the State Board of Equalization of the State of California, shall prosecute said appeal to effect and answer all costs which may be adjudged against it if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this ob-

ligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 14th day of November, 1949.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND.

By /s/ ROBERT E. HUNTER,
Attorney in Fact.

Attest

/s/ S. M. SMITH,
Agent.

Examined and recommended for approval as provided in Rule 8.

/s/ EDWARD SUMNER,
Attorney.

Approved this day of, 1949.
.....,
Judge.

State of California,
County of Los Angeles—ss.

On this 14th day of November, 1949, before me,

Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert E. Hunter, known to me to be the Attorney-in-Fact; S. M. Smith, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] /s/ THERESA FITZGIBBONS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 3, 1950.

[Endorsed]: Filed November 15, 1949.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant, California State Board of Equalization, claimant in the above-entitled matter, through counsel, hereby designates the entire record before the District Court, including all the

papers, pleadings and other documents certified to the District Court by the Honorable Benno M. Brink, Referee in Bankruptcy, with his Certificate on Petition for Review of his order of December 2, 1948, disallowing two items of penalty, in the respective sums of \$293.48 and \$350.30, and totaling \$643.78, which had been claimed by said California State Board of Equalization.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the notice of appeal and this designation.

Dated at Los Angeles, California, this 15th day of November, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1949.

In the District Court of the United States for the
Southern District of California, Northern Di-
vision

No. 6371

In the Matter of
ALTA VINEYARDS COMPANY, a Corporation,
Debtor.

RULING OF THE COURT ON CLAIMS OF
THE COUNTY OF SONOMA AND THE
COUNTY OF FRESNO, OBJECTED TO
BY THE TRUSTEE OF THE DEBTOR

In Proceedings for the Reorganization of a
Corporation

Fresno, California, April 21, 1949

Honorable Leon R. Yankwich, Judge Presiding.

Appearances:

For the Trustee, Earle M. Jones:

SAMUEL F. HOLLINS, ESQ.,

For certain creditors:

DAVID S. DAVIS, ESQ.,

For the Counties of Fresno and Sonoma:

HERBERT W. HARRINGTON, ESQ.

The Court: I am ready to rule now by sum-
ming up the argument in this manner:

That the source of liability of the Trustee for
the taxes is in Section 271 of the Bankruptcy Act
of 1938, which makes him liable for taxes owing

to any state from the debtor, within one year from the date of the filing of the petition. Then taxes which are due from him, after the filing of the petition, while he is in possession and control of the property. Sections 397, 523, and 630 merely confirm this right.

It is also made his duty under the law to pay taxes resulting from the operation of the business. We start with the proposition that the taxes claimed here are not taxes resulting from the operation of the business, but they are property taxes. They are not license taxes, nor are they taxes based upon income, and for that reason the case of *Boteler vs. Ingels*, 308 U.S. 57, does not apply.

In the above case the court was confronted with the proposition that the trustee had continuously operated unregistered and unlicensed vehicles on the California state highways. Tender of fees without accrued penalty was rejected by the State. The trustee did not obtain a license, and did not pay a fee for the renewal. Therefore, the question was whether he was liable for penalty, and the court held that he was, and held that Section 57 (j) did not apply because it was not a tax on which a claim could be filed. The court says:

“If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty.”

And the court concludes that if the trustee operates a business he is subject to the same rule.

Then we come to the case of *In re Knox-Powell-Stockton Co.*, 100 Fed. (2d) 959. As I read

that case, it merely means this: that where, at the time the trustee took over, a penalty has already attached for the delinquency, as to the lien which had accrued before adjudication, the court wanted the penalty as well as the taxes proper, and that therefore the trustee was bound to pay that, although the date of the accrual of taxation preceded the adjudication.

However, Section 57 (j) specifically provides that there shall be no liability for penalties arising from debts owing to the United States or any state. That section is carried over and becomes a part of the reorganization chapter, and is a strict inhibition against the assessment of penalties against the trustee for the nonpayment of the tax.

To impose that obligation upon the trustee would be to force the trustee to borrow money when he does not have the money in his hands or in the registry of the court with which to pay. Clearly the Congress, in making the provision, intended to relieve the properties in reorganization in bankruptcy of such penalties, realizing that such a possible situation would arise. It would be unfair for the State to claim its pound of flesh when he did not have the money.

This is not a concern operating for profit, but a sick business, trying to liquidate. It would become unrealistic to subject the trustee to a penalty, and when they wrote that section they had in mind a situation where the trustee could not pay the taxes.

The answer is, that the State of California and the United States Government, under the judicial process, have taken over a sick business. For what benefit? Not for its own benefit, but for the creditors. Therefore, they are entitled to a different consideration at the hands of the Congress than a private person. At the same time, the Congress was fair by making it the obligation of the trustee to pay taxes which resulted from the operation of the business.

I do not think that Section 106 of the statute, which defines debt, excludes the specific non-liability for penalty. In other words, a general provision is not sufficient to deprive the trustee of the benefit of the specific provision which exempts him from liability for penalty, and the section of the Act specifically included in 57 (j) is applicable to the situation.

So the question can be summed up in this manner: that the Receiver is liable for taxes claimed by both counties, which have arisen since his appointment, or those which were assessed subsequent to his appointment.

The Court finds specifically that the estate was insolvent, which means, as of the date of such finding, the debtor is not in a position to pay his debts; that his assets, at a proper valuation, were not sufficient to pay his debts.

Under the circumstances we are confronted with this question: whether the Receiver should be liable for the payment of penalty. I am satisfied that Section 57 (j) applies, and the Receiver is not

liable for the payment of the penalty, and that it provides for the nonpayment of exempt taxes for actual losses which have accrued by reason of his failure to pay. Which evidences to my mind that the Congress intended to be fair as to tax penalties, and to protect them against the willful acts of the Trustee and also to protect them against loss for the non-willful acts of the Trustee by providing they should be compensated for actual losses.

The Trustee is under the jurisdiction of the court. The motivation is not there, and while you are still liable for taxes, it is unreasonable and unfair to charge him with penalties. So the philosophy of the Bankruptcy Act, and the relation between the court and all estates, all bespeak a reasonable interpretation of the provision which exempts the Trustee from penalty.

To sum up, I would say I would not allow a penalty against a receiver or trustee resulting from the ordinary operation of the estate, unless the Congress says specifically what shall apply and what shall not apply.

I hold that the County of Fresno and the County of Sonoma are entitled merely to the actual tax for the portion of those claims which were assessed after the Trustee took office.

As to the penalty for the prior period, they are not entitled to it, because they have not claimed the lien, and I will hold them strictly to the claim of lien. It is a rule of bankruptcy that a person entitled to a preferred position must make the claim.

They did not claim it, and not having done so, and the time for the filing of the claim having expired, no permission has been asked of the court to file an amended claim, and it would be unfair at this time to saddle the estate with the lien, carrying penalty.

For the record, I will refer again to the opinion *In re Owl Drug Co.*, 21 Federal Supplement 907, as indicating my view, that in bankruptcy and in reorganization under the chapter, this tax statute, and obligation to pay, should be construed strictly against the taxing body. And even in that case I held, as against the Government of the United States, they were not entitled to receive an income tax on income derived by the trustee, because the statute, which is also involved here, calls for an income tax only from the operation of the business. I held in that case that the trustee had liquidated the business; that he was not operating the drug-store, but merely held in the bank over a million and a half dollars from which he derived interest, and he did not have to pay an income tax on the interest.

In that case, the trustee had actually paid one or two installments, and I forbade him, as an officer of the court, from paying the remainder, on the ground that the United States was not entitled to receive it.

So, gentlemen, I have given you the benefit of my prior experience and knowledge in these matters. I have considered the points you have urged, and have indicated why the issue upon which chief

reliance is made for the exaction of the penalties can be distinguished, and why, in my view, not only the just and equitable, but the limit of the tax claimed is the limit I have indicated, namely, the basic claim without penalty.

I will therefore sustain the objection of the Trustee to the claims to this extent only; that is, the money claimed as penalties and interest over and above the basic claims.

To put it differently, the claim of Sonoma County will be allowed in the total sum of \$14,399.01.

The claim of Fresno County will be allowed in the sum of \$38,559.08.

And to that extent, each of these claims will be allowed as a preferred claim under the Act.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 20th day of May, A.D. 1949.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 64, inclusive, contain a full, true and correct copy of Petition Under Chapter XI, Section 322, of the Bankruptcy Act, as Amended; and the original Approval of Debtor's Petition and Order of Reference Under Section 322 of the Bankruptcy Act; Referee's Certificate on Petition for Review of Order re Claim of State Board of Equalization; Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 and Notice of Hearing; Memorandum in Opposition to Objection to Claim Filed by State Board of Equalization in the Sum of \$3,926.36 Plus Additional Interest; Memorandum in re Receiver's Objections to Claim of State Board of Equalization; Supplement to Memorandum in re Receiver's Objections to Claim of State Board of Equalization; Findings of Fact, Conclusions of Law and Order re Claim of State Board of Equalization; Petition for Extension of Time Within Which to File Petition for Review of Referee's Order; Order Extending Time for Filing Petition for Review of Referee's Order; Petition for Review; Decision; Reporter's Transcript of Oral Opinion in Alta Vineyards Company Case; Order of Judge

on Petition for Review of Referee's Order; Notice of Appeal; Undertaking for Costs on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of December, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12418. United States Court of Appeals for the Ninth Circuit. California State Board of Equalization, Appellant, vs. George T. Goggin, Receiver in Bankruptcy of the Estate of Exeter Refining Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 8, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12418

In the Matter of

EXETER REFINING COMPANY, a Corpora-
tion,

Debtor.

STATEMENTS OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, California State Board of Equaliza-
tion, intends to rely on appeal on the following
points:

1. The District Court and the Referee erred in sustaining the objections of George T. Goggin, Receiver for the above-entitled debtor estate, to the claim of the California State Board of Equalization for penalties imposed under the California Sales and Use Tax Law and amounting to \$643.78.

2. The District Court and the Referee erred in refusing to allow a portion of the penalties referred to in the preceding paragraph, namely, penalties amounting to \$293.48, either as a contingent claim pursuant to Section 307, Chapter XI, of the Bankruptcy Act as amended, or as a proper expense of administration by virtue of the fact that the said penalties in the sum of \$293.48 are attributable to the failure of the Receiver herein to file returns due under the California Sales and Use

Tax Law subsequent to the appointment of said Receiver.

3. The District Court and the Referee erred in ruling that the aforesaid penalty in the sum of \$293.48 is not a provable claim under and pursuant to the provisions of Section 63 of the Bankruptcy Act.

4. The District Court and the Referee erred in failing to allow the claim of the California State Board of Equalization for the balance of the penalties referred to in paragraph 1 above, namely, the sum of \$350.30, either as a contingent claim pursuant to Section 307, Chapter XI, of the Bankruptcy Act as amended or as an expense of administration, said penalty being attributable to the Receiver's failure to make timely payment of taxes under the California Sales and Use Tax Law subsequent to said Receiver's appointment although the period during which said taxes accrued terminated prior to the appointment of the said Receiver.

5. The District Court and the Referee erred in failing to allow the claim of the California State Board of Equalization for the aforesaid penalties, namely, \$293.48 and \$350.30, respectively, as a proper claim against, and obligation of, the Receiver herein pursuant to the provisions of 28 U.S.C.A. 960 (formerly 28 U.S.C.A. 124a).

6. The District Court and the Referee adopted erroneous conclusions of law which were and are

contrary to the laws of the State of California, as well as the laws of the United States, and to judicial decisions of State and Federal Courts.

Dated: December 8, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for the California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 10, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF
RECORD TO BE PRINTED

Appellant, California State Board of Equalization, claimant, hereby designates the entire record and all of the proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal and appellant hereby requests that the entire record and all of the proceedings and evidence be printed.

Dated: December 8, 1949.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General.

Attorneys for California State Board of Equalization.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 10, 1949.